RHB BANK BHD

v.

BACTRA PROPERTIES SDN BHD & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM JC
[SUIT NO: D22-2019-2001]
9 FEBRUARY 2011

CIVIL PROCEDURE: *Costs - Security for costs - Application for - Breach of agreement - Whether plaintiff could apply for security for costs from liquidated defendant pursuant to Companies Act 1965, s. 351 - Sufficiency of grounds for application - Whether case involved complex issues - Whether court able to assess 1st defendant's current financial position based on evidence given - Ability to pay if action fails - Whether 1st defendant able to pay its debts including litigation costs*

This was the plaintiff's application for security for costs from the first defendant pursuant to s. 351 Companies Act 1965. The 1st defendant was a development company who undertook the development of some low and medium costs semi-detached houses. The project was initially a joint venture, but was aborted shortly after commencement. The first defendant faced cash flow difficulties due to increasing costs whilst revenue was slow. A term loan ('TL1') was obtained to finance the project. Subsequently, at the request of the 1st defendant, a second term loan ('TL2') was granted. Despite reminders from the plaintiff, the first defendant defaulted in payment on both loans. However, due to a dispute, the 1st defendant brought an action against the plaintiff and, consequently, a settlement agreement was entered into between both parties to settle all disputed matters. The plaintiff claimed that the 1st defendant had breached the said agreement and, hence, made this application on the following grounds: (i) the 1st defendant had been wound up; (ii) the 1st defendant's liabilities were more than its assets; and (iii) the defendant had filed a defence and a counter claim against the plaintiff.

Held (allowing the plaintiff's application with costs):

(1) The plaintiff's claim against the 1st defendant was a straightforward case that did not involve any complex issues. The claim was against the 1st defendant as the principal borrower for the monies due under the two loan facilities. In

A view of the winding up court order, the first defendant was required to satisfy the court that it had sufficient assets to pay the costs of an action in the event if it were to fail. In the present case, there was no evidence to enable the court to assess the 1st defendant's current financial position. The 1st
B defendant in its affidavit in reply failed to show that it had sufficient funds or assets; neither did it exhibit its statement of affairs on accounts. The fact that the 1st defendant had been wound up further strengthened its inability to pay its debts, which included the costs of this litigation. *Skrine & Co*
C *v. Mbf Capital Bhd & Anor & Other Appeals* (foll). (para 19)

[Original amount prayed for reduced to a fair and reasonable amount to be paid within seven days from this Order.]

Case(s) referred to:
D *Faridah Begum Abdullah v. Dato' Michael Chong [1995] 2 CLJ 951 HC* ***(refd)***
Government Of Sarawak v. Sami Mousawi-Utama Sdn Bhd [1998] 4 CLJ 175 HC ***(refd)***
Haidakota (M) Sdn Bhd v. Tan Tiam Chai & Another Appeal [2009] 1
E *CLJ 699 CA* ***(refd)***
Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 ***(refd)***
Skrine & Co v. Mbf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA ***(foll)***

Legislation referred to:
F Companies Act 1965, s. 351

For the plaintiff - M/s Lee Hishammuddin
For the defendant - M/s Shahabudin & Rozima

Reported by Melanie Murthy
G

JUDGMENT

Hasnah Mohammed Hashim JC:
H

[1] Enclosure 62 is the plaintiff's application for security for costs from the 1st defendant pursuant to s. 351 of the Companies Act 1965. The plaintiff prays for the following orders:

I 1) that the 1st defendant pays RM250,000 as security for costs within seven days from the date of the order of the court;

2) that all proceedings in this suit is stayed pending the payment of the security for costs; and

3) in the event the security for costs is not paid the defence and counter claim dated 20 September 2010 is dismissed/struck out with no order as to cost.

[2] The application is supported by an affidavit in support affirmed on 27 October 2010.

[3] Grounds For The Application

i. The 1st defendant was wound up by an order dated 4 February 2010;

ii. The 1st defendant's liabilities more than its asset; and

iii. The defendant had filed a defence and a counter claim dated 20 September 2010.

Brief Facts

[4] The defendant was incorporated in 1982 and its principal activity was property development. The defendant undertook the development of 454 low and medium cost semi-detached houses in 1991. The project was initially a joint venture however the joint venture was aborted shortly after the commencement of the project. The defendant faced cash flow difficulties as costs were increasing whereas revenue was not generated as quickly. A term loan of RM4 million was obtained from Rakyat Merchant Bank Berhad (RMBB) to finance the project.

[5] By way of a letter of offer dated 11 May 1993 and Facility Agreement dated 20 May 1993 at the 1st defendant's request RMBB agreed to grant and make available a RM4 million Term Loan Facility to the 1st defendant (TL1). The purpose of the TL1 was for the redemption of titles and to part finance the working capital to complete the housing scheme project in Desa Surada Seksyen 9 Mukim Bangi Daerah Ulu Langat Selangor ("the project") as follows:

a) 52 units of low cost housing; and

b) 174 units medium low cost housing.

A **[6] Terms and Conditions Of Term Loan 1 (TL1)**

1. Prescribed Interest Rate:	2.5% pa above the bank's effective cost of funds related cost arising from the statutory reserve pr any other requirements imposed by Bank Negara Malaysia.
2. Security:	i) 1st legal charge over various individual titles identified as H.S(M) 15078, H.S(M) 14758, H.S(M) 14786, H.S(M) 14742, to H.S(M) 14753 Seksyen 9 Mukim Bangi Daerah Ulu Langat Selangor.
	ii) Joint and Several Guarantee for RM4 million from the following:
	a) Che' Salma bt. Mehat.
	b) Fahzun Nizam bin Jailani.
3. Disbursement/ Drawdown:	i) Each drawdown shall be for an amount of minimum RM250,000 and in the multiples of RM50,000;
	ii) Upon finalization of all loan documents and compliance; and
	iii) Advances shall be made in the following manner:
	a) for redemption of titles;
	Against the Certificate of Indebtedness. Authorisation is to be given by the Borrower to disburse direct to PKNS for the redemption of titles of the subject land in the Seksyen 9 Mukim Bangi Daerah Ulu Langat Selangor.

	b) For working capital facility;
	Against Notice of Drawdown.
4. Interest Period:	One (1) Two (2) or Three (3) months.

[7] The personal guarantee was executed in 20 May 1993 by 2nd and the 3rd defendants. A deed of debenture was also executed on 12 May 1993.

[8] Subsequently at the request of the 1st defendant a Second Term Loan ("TL2") was granted. This loan was described as a Special Short Term Loan and was for the amount of RM500,000 (the 2nd facility). The terms and conditions of the TL2 is set out in a letter of offer dated 15 October 1996 and facility agreement dated 12 November 1996. The TL2 was secured by debenture and a personal guarantee dated 12 November 1996 signed by the 4th defendant and the 5th defendants. Pursuant to a vesting order dated 22 July 1995 the assets and liabilities of RMBB were transferred from RMBB and vested in BSN Merchant Bank Berhad (BSN). By way of a letter of offer dated 15 October 1996 and another facility agreement dated 12 November 1996 the BSN granted another term loan of RM500,000 to the 1st defendant (2nd TL). The 2nd TL was secured by the following securities:

a) Guarantee and indemnity dated 12 November 1996 by the 4th and 5th defendants (2nd guarantee);

b) Debenture dated 12 November 1996 between the 1st defendant and BSN over the fixed and floating assets of the 1st defendant (2nd debenture); and

c) Assignment of contract proceeds dated 12 November 1996 between the 1st defendant and BSN.

[9] By a vesting order dated 7 November 1996 the assets and liabilities of RMBB in BSN were transferred and vested in DCB Bank Berhad. DCB then changed its name to RHB Bank Berhad on 1 July 1997.

[10] A dispute arose relating the appointment of Receivers and Managers and the 1st defendant brought an action against the plaintiff *vide* suit no. D7-22-2271-1999 (the suit). Consequently a Settlement Agreement was entered between the parties dated

24 January 2000 wherein the parties agreed conditionally to compromise all claims that the parties have or may have against each other based on the terms and conditions under the Settlement Agreement. It is a term under the Settlement Agreement that the 1st defendant will unconditionally waive all of its rights it may have whether under the statute, common law and/or in equity to institute, commence or bring an action and/or proceedings whatsoever whether in court or otherwise against the:

1. the Debentures dated 20 May 1993 and 12 November 1996;
2. all credit and banking facilities granted to the 1st defendant pursuant to the TL1 and TL2 facility; and
3. any exercise or purported exercise by the plaintiff of any of its rights, power or remedies under any of the security documents.

[11] The 1st defendant had unconditionally withdrawn the suit against the plaintiff. The defendant alleged that there was a breach by the plaintiff as they have compromised based on the terms of on the terms and conditions of the settlement agreement.

[12] Despite reminders from the plaintiff the 1st defendant defaulted in the repayment of the 1st and 2nd Term Loan facilities. On 1 July 1999 the plaintiff appointed R&M over the 1st defendant as the 1st defendant failed to meet the plaintiff's demand for repayment. The 1st defendant then filed an action in the High court to challenge the appointment of the R&M (Suit No. D-22-2271-1999). However, on 24 January 2000 the parties entered into an agreement to settle the all disputed. Under the settlement agreement dated 24 January 2000 the 1st defendant agreed to withdraw the High court suit. According to the plaintiff the 1st defendant breached the said settlement agreement by failing to settle the Aggregate Redemption Sum of RM2.1 million.

The Plaintiff's Claim

[13] The plaintiff's claims against the defendants are as follows:

a) The 1st defendant as the principal borrower, for the monies due and owing under the two Term Loan Facilities ie, 1st and the 2nd term loan facilities of RM4 million and RM5000,000;

b) The 2nd and 3rd defendants as personal guarantors under the outstanding RM4 million term loan; and

c) The 4th and 5th defendants as personal guarantors under the 2nd TL.

The Law

[14] Section 351 of the Companies Act 1965 provides as follows:

> (1) Where a company is plaintiff in any action or other legal proceeding the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
>
> (2) The costs of any proceeding before a court under this Act shall be borne by such party to the proceeding as the Court may, in its discretion, direct.

[15] Dato' Gopal Sri Ram JCA (as he then was) in *Skrine & Co v. Mbf Capital Bhd. & Anor & Other Appeals* [1998] 3 CLJ 432 explained the process of arriving at the conclusion whether security for cost should be awarded under s. 351 of the Companies Act 1965:

> As may be seen; and this is borne out by the authorities decided upon the parallel provisions in other common law jurisdictions; the section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

[16] Ian HC Chin J in *Government Of Sarawak v. Sami Mousawi-Utama Sdn. Bhd.* [1998] 4 CLJ 175 said:

> In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

[17] In *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273, [1973] QB 609, it was held that the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances. Lord Denning MR in *Sir Lindsay Parkinson & Co. Ltd. v. Tripland Ltd*.'s case had this to say:

> The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr. Levy helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is *bona fide* and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money – (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

[18] Ariffin Zakaria J in *Faridah Begum bte Abdullah v. Dato' Michael Chong* [1995] 2 CLJ 951, is of the view that:

> … the court should only embark into the investigation upon the merits in plain and obvious cases and not in cases where the issues involved complex, as I find in this case. On the face of the pleadings and affidavits before the Court I am of the view that the final outcome of this case is far from clear. Therefore, in the final analysis, the question of merits is not really crucial to the ultimate outcome of this application.

[19] In the present case, the question is simply whether or not it is just to order security for costs? The plaintiff's claim against the 1st defendant is a straightforward case and does not involve any complex issues. The plaintiff claimed against the 1st defendant as the principal borrower for the monies due and owing under the two Term loan Facilities. Furthermore by winding up court order was granted on 4 February 2010 against the 1st defendant. His Lordship Gopal Sri Ram JCA(as he then was) in *Skrine & Co v. Mbf Capital Bhd. & Anor & Other Appeals* [1998] 3 CLJ 432 had said that a company need not have ready access to cash in order

to satisfy a court that it is able to pay the costs of an action it brings, in the event of a failure. It need only satisfy the court that it has sufficient assets to satisfy an order of costs against it. In the present case the 1st defendant there is no evidence before this court which enables it to assess the 1st defendant's current financial position. The 1st defendant in its affidavit in reply failed to show that the 1st defendant had sufficient funds or asset in the event the claim is unsuccessful. No statement of affairs, accounts of 1st defendant was exhibited. The fact that the 1st defendant has been wound up further strengthens the fact of the inability of the 1st defendant to pay its debts which would include the costs of this litigation.

[20] Ian HC Chin J in *Government of Sarawak v. Sami Mousawi-Utama Sdn. Bhd.* [1998] 4 CLJ 175 said that the court must carry out a balancing exercise:

> On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see *Farrer v. Lacy, Hartland & Co* [1885] 28 Ch D 482 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see *Pearson v. Naydler* [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

[21] The Court of Appeal in *Haidakota (M) Sdn Bhd v. Tan Tiam Chai & Another Appeal* [2009] 1 CLJ 699 held:

> Section 351 of the Companies Act 1965 ('the Act') confers a very wide discretion on the High Court to order a company to provide security for costs in an action brought by it or against it. There are settled guidelines upon which the discretion falls to be exercised. Firstly, the application for security for costs must be made with reasonable promptitude after the issue of the writ. Delay

A is a good reason for the court to exercise discretion against the parties applying for security. Secondly, an order under s. 351 of the said Act should generally not be made where the making of it would be oppressive. This is particularly so in a case where the company has an arguable case. Thirdly, security for costs should not be ordered where there is absence of any *mala fide* on the part of the plaintiff company in bringing its claim. Special attention should be paid to the balance that should be drawn between exposing an innocent defendant to the expense of defending a claim against the risk of shutting out a plaintiff from ventilating a genuine grievance.

[22] Guided by the principles enunciated in all the cases mentioned above I come to the conclusion that there should be security for costs and therefore encl. 62 is allowed with cost to the plaintiff/applicant. However I am of the opinion the sum of RM250,000 as security for costs is excessive. A sum of RM50,000 for security for costs is a fair and reasonable amount. The 1st defendant must pay the said amount within seven days from this order.